UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
NEW YORK BRANCH OFFICE
DIVISION OF JUDGES

INDEPENDENCE RESIDENCES, INC.

EMPLOYER

and **Case No. 29-RC-10030**

UNION OF NEEDLETRADES INDUSTRIAL AND TEXTILE EMPLOYEES (UNITE) AFL-CIO

PETITIONER

Frederick D. Braid, Esq. and Colleen A, Sorrell, Esq. ***(Holland & Knight, LLP)*** **New York, New York for the Employer.**
Brent Garren, Esq., **New York, NY for the Petitioner.**

RECOMMENDED DECISION ON OBJECTIONS

STEVEN FISH, Administrative Law Judge. On April 24, 2003,[1] Union of Needletrades, Industrial and Textile Employees (UNITE), AFL-CIO, herein called the Union, UNITE or Petitioner, filed a petition to represent certain employees of Independence Residences, Inc., herein called the Employer or IRI. On May 9, 2003 the Director of Region 29 approved a Stipulated Election Agreement executed by the parties, providing for a mail ballot election to be conducted among employees in the following unit:

> All full-time and regular part-time and Relief employees in the classifications of Direct Care Workers, Residential Habilitation Specialists, Day Habilitation Workers, Medical Care Workers and Maintenance, employed by the Employer at and out of its office located at 93-22 Jamaica Avenue, Woodhaven, New York, and its facilities listed in Appendix A,[2] excluding all office clerical and administrative employees, technical employees, professional and managerial employees, guards and supervisors as defined in Section 2(11) of the Act.

After IRI changed counsel, its new attorney sent a letter to the Director, dated May 16, requesting that he cease giving effect to the Stipulated Election Agreement, and that all further proceedings be stayed pending the outcome of litigation involving New York Labor Law Section 211-a.

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[1] All dates hereinafter are in 2003 unless otherwise indicated.
[2] Appendix A listed the names and addresses of IRI's facilities.

On May 30, the Director denied the Employer's requests to vacate the Stipulated Election Agreement and to stay all proceedings pending the outcome of the litigation involving Labor Law Section 211-a. Thereafter, the Employer filed a Request for Review of the Director's actions. On June 11, 2003, the Board denied said request, but noted that "the Employer may seek to raise, in any post-election proceedings, questions regarding the impact, if any, of New York Labor Law Section 211-a."

The election was conducted by mail ballot, between June 2 and June 16. The tally of ballots made available to the parties on June 17, showed the following results:

Approximate number of eligible voters	151
Number of void ballots	5
Number of votes cast for Petitioner	68
Number of votes cast against participating labor organization(s)	32
Number of valid votes counted	100
Number of challenged ballots	7
Number of valid votes counted plus challenged ballots	107

Challenges are not sufficient in number to affect the results of the election. A majority of valid votes counted plus challenged ballots has been cast for Union of Needletrades, Industrial, and Textile Employees (UNITE), AFL-CIO.

Thereafter, on June 24, the Employer filed timely objections to conduct affecting the results of the election.

The objections are as follows:

POST-ELECTION OBJECTIONS

Independence Residences, Inc. ("IRI") hereby objects to the conduct of the representation election in this matter and asks that the results of same be set aside on the basis of the following grounds.

1. The strict laboratory conditions under which representation elections must be conducted were not present in this election because of the pre-election campaign conduct of UNITE. UNITE freely expressed its views, argument, and opinions orally and disseminated written material expressing its views, arguments and opinions encouraging union representation and union membership while restraining IRI's expression of views, arguments, and opinions and the dissemination of written material discouraging union representation and union membership by supporting and enforcing the employer neutrality restrictions of New York Labor Law Section 211-a. UNITE's actions prevented the free exchange of information and ideas discouraging union membership, thereby creating a pre-election atmosphere devoid of vigorous opposition to union representation and union membership. The result was a one-sided organizing campaign that deprived IRI's employees of all of the information that would have helped them make a informed decision on the question concerning representation. Moreover, the absence of any vigorous opposition to union representation and union membership by IRI gave the misleading impression that IRI either encouraged or was not opposed to union membership. As a result there was not an election that truly expressed the informed intention of the employees.

2. The strict laboratory conditions under which representation elections must be conducted were not present in this election because of the conflict between New York State Law Section 211-a law and the National Labor Relations Act. New York's passage of the conflicting state law was interference by a third party in the election. New York Labor Law Section 211-a prevented IRI from advocating its belief that union representation and union membership should have been discouraged among its employees. IRI was unable to express its views, arguments, and opinions, or to disseminate written material discouraging union representation and union membership because of the restrictions imposed on employers by New York State Labor Law Section 211-a. In the absence of the free exchange of views, arguments and opinions vigorously discouraging union representation and union membership because of the prohibitions in New York Labor Law Section 211-a, the results of the election in this matter do not fairly reflect the informed choice of IRI's employees because they were not completely informed, as would have been the case in the absence of New York Law Section 211-a.

3. The Regional Director erred in allowing a mail-ballot election to occur in light of the fact that many of the eligible voters do not speak English and some are illiterate in English and their native language. Conducting a mail ballot election effectively disenfranchised illiterate workers by preventing them from getting the necessary assistance in reading election notices and marking the ballot through the use of interpreters at the polling location that would have existed in the traditional manual election on the employer's premises. As a result, the true intent of the voters is not accurately recorded on the ballots.

4. The Regional Director interfered with the election by enforcing New York Labor Law Section 211-a by virtue of his refusal to stay all proceedings, including the election, notwithstanding the General Counsel of the National Labor Relations Board's public statements and his brief to the U.S. Court of Appeals for the Ninth Circuit, in *Chamber of Commerce v. Lockyer*, advocating that New York Labor Law Section 211-a is preempted by the NLRA because of its interference, inter alia, with the free speech guaranteed by Section 8(c) of the Act in pre-election campaigns. Forcing the election to be conducted under such circumstances prevented IRI from expressing its views, arguments and opinions and disseminating its views, arguments, and opinions to discourage union representation and union membership among its employees. The free exchange of views, arguments, and opinions discouraging union representation and union membership was absent from this election because of the Regional Director's denial of IRI's petition to stay all proceedings. It is the Regional Director's responsibility, as an agent of the National Labor Relations Board, to enforce the National Labor Relations Act. The Regional Director failed to do so, and instead served to interfere and infringe upon the National Labor Relations Act rights of IRI and its employees by inhibiting the free exchange of information necessary to educate voters about representation elections. In addition, the Regional Director's failure to stay proceedings interfered with the requisite impartiality of the National Labor Relations Board be permitting New York's "neutrality" restrictions to prevent IRI from communicating effectively to its employees its views, arguments and opinions against union representation and union membership. As a practical matter, the Regional Director's failure to stay the election effectively assisted UNITE in its organizing efforts.

5. The National Labor Relations Board itself, by failing to grant IRI's Request for Review, unlawfully interfered with the representation election among IRI's employees. Allowing the election to be conducted while New York Labor Law Section 211-a is in effect prevented IRI from expressing its views, arguments and opinions and disseminating its views, arguments, and opinions to discourage union representation and union membership among its employees. The free exchange of views, arguments, and opinions discouraging union representation and union membership was absent from this election because of the National Labor Relations Board's denial of IRI's Request for Review of the Regional Director's denial of its petition to stay all proceedings. The National Labor Relations Board's action inhibited the free exchange of information necessary to educate voters about representation elections and interfered with the requisite impartiality of the National Labor Relations Board by permitting New York's "neutrality" restrictions to prevent IRI from communicating effectively to its employees its views, arguments and opinions against union representation and union membership. As a practical matter, the National Labor Relations Board's failure to stay the election effectively assisted UNITE in its organizing efforts.

6. The State of New York, Department of Labor and Attorney General, interfered with the election as a third party by enforcing New York Labor Law Section 211-a despite the dangers of preemption of federal law as expressed in the National Labor Relations Act. The state statute, coupled with the knowledge that the New York State Department of Labor and the Attorney General enforced the neutrality restrictions effectively prevented IRI from expressing its views, arguments and opinions against union representation and union membership, thereby resulting in the absence of a balanced presentation of pro- and anti- union representation sentiment and voting by an uninformed, uneducated electorate. Accordingly, the State of New York supported the activities of UNITE in getting its union encouragement message out in favor of unionization, and instilled the fear of violating a state statute into the employer for trying to voice its own views, arguments and opinions discouraging union representation and union membership. The state acted effectively to support UNITE and oppose the employer in the election, thereby giving the impression that UNITE was officially sanctioned. This naturally interfered with informed, free employee choice on a question concerning representation.

On August 4, the Director, issued a Report on Objections and Notice of Hearing, in which he directed a hearing on the Employer's Objections, 1, 2, 4, 5 and 6, and recommended that Objection No. 3 be overruled.

The Union filed unfair labor practice charges in Case Nos. 29-CA 2567, 25697, and 25720 on various dates between June 13 and July 17, alleging that IRI violated various Sections of the Act.

On September 30, the Director issued an Order Consolidating Cases, Consolidated Complaint Report on Objections and Notice of Hearing, in which he consolidated the instant representation case, with the unfair labor practices alleged in said complaint, which asserted that IRI violated Sections 8(a)(1) and (3) of the Act.

At the opening of the trial on the Consolidated Cases, I denied the motion made by IRI to sever the representation case from the unfair labor practice cases, since part of the record in the unfair labor case was relevant to the representation issues. However, I stated that at the close of the trial, I would then sever the cases for decision, an order to expedite the processing of the representation matter. The hearing was held on nine days between November 18 and December 12.

Briefs have been filed by the Employer and the Union and have been carefully considered. Based on the entire record, including my observation of the demeanor of the witnesses, I make the following recommended decision.

I. FACTS

A. Section 211-a of the Labor Law

All of the objections filed by the Employer center around Section 211-a of the New York Labor Law, and its alleged effect on the election conducted by the Board. The law reads as follows:

§ 211-a. Prohibition against use of funds

> 1. The legislature hereby finds and declares that sound fiscal management requires vigilance to ensure that funds appropriated by the legislature for the purchase of goods and provision of needed services are ultimately expended solely for the purpose for which they were appropriated. The legislature finds and declares that when public funds are appropriated for the purchase of specific goods and/or the provision of needed services, and those funds are instead used to encourage or discourage union organization, the proprietary interest of this state are adversely affected. As a result, the legislature declares that the use of state funds and property to encourage or discourage employees from union organization constitutes a misuse of the public funds and a misapplication of scarce public resources, which should be utilized solely for the public purpose for which they were appropriated.
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> 2. Notwithstanding any other provision of law, no monies appropriated by the state for any purpose shall be used or made available to employers to: (a) train managers, supervisors or other administrative personnel regarding methods to encourage or discourage union organization, or to encourage or discourage an employee from participating in a union organizing drive; (b) hire or pay attorneys, consultants or other contractors to encourage or discourage union organization, or to encourage or discourage an employee from participating in a union organizing drive; or (c) hire employees or pay the salary and other compensation of employees whose principal job duties are to encourage or discourage union organization, or to encourage or discourage an employee from participating in a union organizing drive.

> 3. Any employer that utilizes funds appropriated by the state and engages in such activities shall maintain, for a period of not less than three years from the date of such activities, financial records, audited as to their validity and accuracy, sufficient to show that state funds were not used to pay for such activities. An employer shall make such financial records available to the state entity that provided such funds and the attorney general within ten business days of receipt of a request from such entity or the attorney general for such records.
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> 4. The attorney general may apply in the name of the people of the state of New York for an order enjoining or restraining the commission or continuance of the alleged violation of this section. In any such proceeding, the court may order the return to the state of the unlawfully expended funds. Further, the court may impose a civil penalty not to exceed one thousand dollars where it has been shown that an employer engaged in a violation of subdivision two of this section; provided, however, that a court may impose a civil penalty not to exceed one thousand dollars or three times the amount of money unlawfully expended, whichever is greater, where it is shown that the employer knowingly engaged in a violation of subdivision two of this section or where the employer previously had been found to have violated subdivision two within the preceding two years. All monies collected pursuant to this section shall be deposited in the state general fund.
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> 5. The commissioner shall promulgate regulations describing the form and content of the financial records required pursuant to this section, and the commissioner shall provide advice and guidance to state entities subject to the provisions of this section as to the implementation of contractual and administrative measures to enforce the purposes of this section.

There have been no regulations issued by the Commissioner or the Attorney General implementing the statute as provided therein. The law which was passed on October 30, 2002, was actually an expansion of the prior law, passed in 1996. Prior to the 2002 bill being signed by the Governor, his counsel, James McGuire asked for comments on the bill from Kathy Bennett, Chief of the Legislative Bureau of the Attorney General's Office. Bennett responded to McGuire in a memorandum dated September 30, 2002. In that memo, Bennett stated that the bill expands the provisions of the current bill, and recounted that previous investigations revealed that state funds used to influence union organizing were not covered by the then current provision of the law. It further indicates that the 2002 legislation "expands the coverage of the statute to include the hiring of consultants, attorneys, contractors, or employees, to encourage or discourage union organization. It requires employers who engage in activities intended to influence employees' choice of union organization to maintain financial records sufficient to demonstrate that state monies were not used to fund such activities."

The letter further states that the expanded provisions "more completely fulfill the legislative intent of assuring that state funds expended for the purchase of goods or the provisions of services are used only for those purposes and not to influence employee choices concerning union organization."

The letter also opines that both the current law and the new bill are not preempted by the National Labor Relations Act, since the bills merely prevent the employers from using state funds to engage in any of the prohibited activities, and represents a choice by New York State not to fund such activities.

On October 30, 2002, Margery E. Lieber, Assistant General Counsel for Special Litigation of the Board, wrote to Linda Angello, Commissioner, New York Department of Labor, concerning the bill. Lieber recounts that she was asked by the General Counsel, Arthur Rosenfeld to write the letter, and concludes that "it appears that the labor neutrality law will effectively regulate conduct that is intended by Congress to be free from governmental interference."

Lieber states that the law imposes "a requirement of employer neutrality during union organizing driving drives by restricting state funds from being used to encourage or discourage unionization." By adding "burdensome record keeping" with "substantial risks of punitive civil penalties" to the bill, Lieber opined that "these provisions, taken together, appear to go well beyond New York's choice not to fund certain conduct, as they interfere with rights under the National Labor Relations Act to freely discuss labor relations issues during union organizing."

Lieber asked how the state intended to enforce the law consistent with established federal preemption law, and requested "any clarification regarding the law's specific provisions and their application and interpretation, including proposed regulations, (which) would greatly assisted the General Counsel's analysis and recommendation to the National Labor Relations Board on this matter."

While the letter asks for a response by December 1, 2002, the record does not reflect when or if any response was ever sent by the State or received by Lieber to her requests. The record also does not reflect whether or not the General Counsel made any recommendation to the Board with respect to this legislation.

The record does reflect, according to an article in the Buffalo News, dated May 14, 2003, that General Counsel Rosenfeld commented about the law. The headline in the article reads, "National Labor Relations Board wants state's 'union neutrality' law struck down." The article reads that the law "is a political ploy that undermines federal Labor Law and should be struck down, the nation's top labor management referee said Friday in Cheektowaga." The article reported on Rosenfeld's speech at a panel on Labor Law organized by the State Bar Association and the Cornell School of Industrial Relations.

The article also mentioned that the law was being challenged in Federal District Court, and Rosenfeld stated that he believed that the law and laws like it in California infringe on the National Labor Relations Act.

The article also quoted lawyers present at the conference who represent unions, who disagreed with Rosenfeld, and concluded that since the law focuses on how state contractors spend public funds, it doesn't conflict with federal law.

The Federal District Court lawsuit referred to in the article is Case No. 3-CV-413, filed on April 3, 2003, *Health Case Association of New York et al. v Pataki et al.,* seeking a declaration that the law is invalid for a number of reasons, including preemption. The case as of the close of this hearing, had not been argued before the judge. Briefs and responses have been filed in that case and have been incorporated into this record. It does not appear that the Board or the General Counsel has filed any briefs or taken any official position in that litigation.

However, in a case filed in California, attacking a similar law, the federal district judge found the law to be preempted in *Chamber of Commerce v. Lockyer,* 225 F. supp, 2d, 1199 (C.D. Cal. 2002). That decision was appealed to the Circuit. In that case, the Board voted to authorize the General Counsel to file a brief in support of the Judge's decision, and arguing that the California law in question was preempted by the National Labor Relations Act. That brief, as well as other briefs and amici have also been introduced into the record in this proceeding.

On April 20, 2004 the 9th Circuit issued its decision, affirming the District Court's finding that the California statute was preempted by the National Labor Relations Act. 364 F.3d 1154 (9th Cir. 2004).

B. IRI's Business

IRI is a private, non-profit employer that provides services to individuals with developmental disabilities. IRI provides residential services to individuals with developmental disabilities. IRI provides residential services, which includes twenty four hour seven day a week care in a community residential setting, as well as day services, family support services and other related services.

IRI's activities are regulated by the office of Mental Retardation and Developmental disabilities (OMRDD), a New York State Agency that sets operating standards which it enforces through periodic audits of records and on site visits. Most of IRI's money for its general budget comes from a combination of federal, state and local government sources. The funds are distributed to the Agency through New York State Agencies, although a large portion of these funds are Federal dollars. IRI's Executive Director Raymond De Natale estimated that approximately 50% of Respondent's budget, comes from the federal government, primarily under the Medicaid program. [3]

IRI also receives donations and other monies from the general public, which are listed in its budget as "private monies." Some of these funds are restricted by its donors for specific purposes. Generally these funds amount to $80,000 to $100,000 per year. According to IRI's independent audit for the year ending June 30, 2002, the amount of private money was $97,000. This audit lists no restriction on these monies. De Natale was unaware if there were any restrictions on the use of this $97,000, and conceded that if there were any restrictions on these monies, it would be reflected on the audit. Further the audit lists as "unrestricted net assets", the amount of $1, 272 million dollars, which includes the $97,000 in private monies.

The audit also lists "interest and other income" of $33,789, which De Natale concedes is not money appropriated by the state. IRI also receives "other third party income" according to its audit report, but De Natale did not know what that income referred to or whether that income is or is not "appropriated" by the State.

New York State reimburses IRI for its costs in providing its services and exercises substantial control over how IRI dispenses state funds that it receives. It requires detailed financial reporting, and expressly disallows spending on a long list of items, characterized as "non allowable." The principles used by OMRDD to determine allowable costs are (1) whether the cost is related to the provision of services to consumers, the enhancement of agency staff skill and training, the direct provision of services to consumers, or the operation of the agency," and (2) costs must be "subject to the prudent buyer concept." OMRDD explicitly disallows 32

[3] IRI's annual budget is approximately $8 million per year.

categories of costs, including "diversion, entertainment or amusement to owners", political and charitable contributions, fines, parking tickets and other costs resulting from failure to comply with Federal, State or Local government laws, dues paid to lobbying organizations, purchase of alcoholic beverages, real estate taxes, payment of individual employee professional licensing and or credentialing fees, and costs of investment counsel and staff and similar expenses incurred solely to enhance income from investments."

C. The Union's Campaign

UNITE began its organizing campaign in early April of 2003. From April 16 to April 22, UNITE conducted what was referred to by its coordinator of organizing Allison Duwe as a "blitz", which consisted of 11 organizers making home visits at times unannounced, to the homes of employees of IRI. These visits sometimes lasted as long as a few hours, and at times were conducted by more than one organizer at a time. Duwe alone visited 35-50 different IRI employees during the "blitz', and of those, some were visited as many as five times. All of these visits were conducted by paid, professional organizers who had received training from the union or affiliated entities such as the AFL-CIO.

After April 22, 2003, three organizers, including Duwe worked on the campaign and continued its practice of household visits. A day or two before the mail ballots were sent out, June 2, 2003 one additional organizer returned to the campaign for a few days.

The Union's campaign also consisted of meetings with employees, and the distribution of flyers and leaflets throughout the campaign, which lasted until June 16, 2003 the date in which ballots were to be returned to the Board.

There is no evidence that the Union made any lobbying efforts with respect to Section 211-a during the campaign. It also did not make any specific reference to the law during the critical period in any of its literature.

However, early on in the campaign, the Union prepared and sent out a one page document to employees of IRI. This document was signed by 12 employees of IRI, who were identified as members of the organizing committee.

The record does not establish precisely when this document was sent to employees of IRI. Duwe testified that it was sent to the employees "at the beginning of its campaign," but the record does not establish whether it was sent out before or after the union filed its petition on April 24, 2003. The document reflects that the signers had formed an organizing committee, and alleges that a majority of employees had signed authorization cards for the Union, and that the next step is to file with the National Labor Relations Board for a union election at work. The document then reads that "we expect everyone to vote yes, and we expect management to remain neutral and to respect our rights and the law during the organizing drive."

Duwe, who drafted this document, with the assistance of the committee, testified that she was not referring to Section 211-a of the Labor Law in that document, and that the statement about neutrality typically appears in union leaflets and in committee letters, whether or not the employer is subject to Section 211-a of the Labor Law.

Further, on May 16, IRI sent out a letter to employees concerning the then scheduled election. In that letter, IRI stated that IRI is forbidden by law from taking action to encourage or discourage union action, and that IRI "must remain neutral whether or not that is how we really feel." After employees received this letter, several employees asked Duwe about this statement

in the letter. She informed them that IRI did not have to remain neutral, and that IRI was allowed to express its opinion and to provide information to its employees.

On May 30, 2003, a letter was sent to IRI's employees, signed by a number of local politicians, including Congress members, City Counsel members and State senators from Brooklyn and Queens. Although not signed by UNITE, it is conceded that the Union was involved in the preparation of the letter, as well as the persuading of the politicians to sign the document. The letter indicates that the signers are supportive of the employees' efforts to be represented by UNITE, and adds that the union is a strong advocate for its members, that has "won real results for over 1500 workers who, like you, take care of people with developmental disabilities at agencies across the state."

The letter makes no reference to section 211-a or to any obligation on the part of IRI to remain neutral in the campaign. The only reference to IRI is a statement that employees "have the right to decide whether they want to join a union without pressure from their employer. We hope IRI management has not attempted to intimidate you or any of your co-workers into voting against the union."

After the election, and while the instant objections were pending, IRI received a letter signed by the same politicians who sighed the previous letter [4], plus some additional officials. This letter urges IRI to withdraw its objections, and to respect the decision of its employees to join UNITE.

This letter does make reference to Section 211-a of the Labor Law, as follows:

> As we understand it, you claim IRI was unable to campaign against the union because of the limitations of the Misuse of Public Funds Law. In the first instance, IRI's claim runs counter to the facts as we understand them from your staff. They report receiving several memos from management attacking the union and being required to attend anti-union lectures.
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> In addition, we believe that New York State's misuse of public funds law does just that: Prevents an agency like IRI from misusing public funds for very specific purposes, such as paying for antiunion consultants, during a union organizing drive. It does not prevent you from exercising your first amendment right to free speech. The overwhelming vote of your staff for UNITE indicates not an inability of IRI management to speak freely but rather your staff's strong desire for a voice at work.

D. IRI's Campaign

As noted above the petition was filed on April 24. The parties entered into a Stipulated Election Agreement on May 9, providing for a mail ballot election, to be held between June 2 and June 16.

[4] The Union concedes that it authored this letter as well. The letter was also personally delivered to De Natale by committee member in the presence of Duwe.

De Natale testified that he knew about Section 211(a) from discussions with colleagues at association meetings early in 2003. These colleagues referred to the law as a "union gag order," and they explained to De Natale that organizations using public funds must be neutral and not say anything for or against unionization of its employees. They also told De Natale that a similar law in California exists which is being challenged as being preempted by the NLRA. Further there were no regulations issued as yet by the state, and that if the statute is violated, an employer could face significant penalties. De Natale did not read the statute at that time, since he had no union organization going on at IRI.

After receiving the Union's petition on April 24, De Natale asserts that he read the law and sought counsel. De Natale states that he felt that the law was unclear as to what IRI could or could not do, and claims that as a result of a "conservative" reading of the statute, IRI decided to sign a Stipulation. De Natale states that he believes that if IRI sought a hearing on unit issues or methods of conducting the election, this would be construed as conduct discouraging unionization. However, De Natale conceded that in fact, IRI did propose during discussions leading up to the execution of the Agreement that direct care supervisors be excluded from the unit. The Union finally agreed to that exclusion. De Natale also conceded that IRI agreed to conducting the election by mail ballot, and made no objection during the discussions about that subject. Although De Natale testified that IRI did not object to the mail ballot procedure, because he and IRI Counsel were concerned that 211-a would prohibit objecting to it, he could not say why 211-a could not in IRI's view, also inhibit IRI asserting that direct care supervisors be excluded from the unit.

After the Stipulation was approved, IRI retained new Counsel, who then filed a motion to withdraw from the Stipulation and to stay the election. IRI presented no evidence as to why or how that decision was made.

De Natale did testify however, that as a result of his reading of 211-a and his discussions with his attorney, his colleagues and his managers, he concluded that the law seriously inhibited the campaign that IRI would run. De Natale testified that the law raised serious and unsettled questions about what was state or public money and what was neutral. He therefore concluded after these discussions and his reading of the law, that IRI was required to be "neutral" during the course of the campaign. He further testified that IRI attempted to do so throughout the campaign. He also testified that but for 211-a, IRI would have run a more "aggressive" campaign. The only specifics mentioned by De Natale detailing what matters were discussed and rejected because of 211-a, was the possibility of doing research about UNITE's history, hiring a consultant, or simply telling employees to vote "no" in the election.

IRI did in fact decide to engage in a campaign, but De Natale testified that it attempted to comply with 211-a by being "neutral", and restricted its campaign to making factual assertions, without giving an opinion as to whether IRI believed that employees should vote for or against the Union.

In that regard, on May 19, IRI distributed a memo to its managers and supervisors concerning permissible and impermissible conduct during union organizing. Most of the memo deals with permissible and impermissible activity under the National Labor Relations Act. However it also made reference to 211-a, describing it as a law that "prohibits organizations like ours from encouraging or discouraging union membership," and "that permits unions to try to persuade employees to vote for union representation, but requires us to remain neutral."

The memo goes on to indicate that IRI believes that it would not be in it or its employees interests if a union were selected, and that IRI can educate its employees about various facts so

that they will come to their own conclusion that union representation would not be in their best interests. Further the memo states that IRI wants to make sure that it does not violate the New York neutrality law, so supervisors and managers must be familiar with ground rules to be followed.

After setting forth examples of unlawful activities under the Act, such as promises, threats and interrogations, the memo states that "New York law prohibits us from communicating to our employees our opposition to unionism or a particular union even though we comply with the federal law requirements and make no threat of reprisal or promise of benefit. Therefore, we will have to simply present the facts in a straightforward, neutral manner in order to educate our employees about unionism and rely upon their good judgment to reject union representation because they have come to the conclusion, after considering as much information as we can give them, that union representation is not in their interests."

The memo concludes by observing IRI has "a challenge to educate our employees without violating New York's neutrality law in an effort to have them come to the conclusion themselves to vote against union representation in the National Labor Relations Board election."

According to De Natale, IRI tried to run its campaign consistent with these instructions to its supervisors. In that connection IRI issued a number of mailings and leaflets to its employees. As noted above, one of these mailings, dated May 16, made reference to the New York neutrality law. The letters states that "IRI is forbidden by law from taking action to encourage or discourage your decision on unionization. …Under the New York law just referred to the union is free to campaign for your vote and to do whatever it can within the law to persuade or encourage your to vote for unionization. We, according to the law that is being challenged, must remain neutral, whether or not that is how we really feel… So you should not read anything into the fact that the union is promoting itself and trying to persuade you to vote for it while we do not say anything to you about our view." The letter then goes on to urge employees to make their own decision, based in part on the facts and information that they receive from IRI and other sources. IRI's communications repeatedly urge employees to vote, make their own decision, consider the facts, and the employee must vote to be heard.

The mailings also contain numerous statements, that while they do not expressly urge employees to vote "NO", can reasonably be construed as urging such an action. Thus in the May 9, mailing, IRI states that it "our carefully established belief that UNITE's presence of IRI is not in the best interest of our employees and consumers."

In that same letter, IRI states that it has visited UNITE's website, "and are convinced that UNITE offers direct care workers nothing to assist them."

The letter then talks about UNITE's flyers and its discussion of respect and professionalism, higher wages, and a stronger voice. It responds that IRI has counseled supervisors who do not follow respect or courtesy, and adds that the staff has a voice. The letter also points out that IRI is not on an "us versus them kind of place, even though a union might try to paint that picture in their attempt to gain members."

Later on in that same letter, IRI discusses the benefits that it offers and that its funding comes from government agencies. It adds that "we do not believe that there is anything that UNITE can do to get government agencies that fund us to increase IRI's income. To the contrary, UNITE's involvement in the negotiation process might actually result in less money being taken home by employees."

Further, the letter goes on to observe that UNITE is a garment industry Union, and asks what such a union knows about IRI's business. The letter concludes by explaining its "decision to suggest that IRI does not need an intermediary party involved…

In another letter dated May 14, IRI, after describing the election procedure, discussed the negotiation process. In that connection, it observed that "history tells us that frequently negotiations take a very long time, and rarely do the negotiations achieve the promised results. No increases to salary or any changes in benefits will be made until an agreement between IRI and the union is reached . In some other agencies this has taken more that two years."

IRI also distributed a flyer which reflect that UNITE was found guilty of violating Federal law in an National Labor Relations Board case involving *Duane Reade* in April of 2003.

The flyer detailed the violations found, and asked the question, "Do you want to be represented by a union that violates the law"

In another flyer sent out by IRI, it sets forth issues be considered when voting, and mentions no dues or fees without a union, direct open door policy to Management now, choice of health benefits that employees now have, as well as an existing grievance procedure.

In another flyer entitled "Setting the record straight", IRI points out again that changes must be bargained, and "it is difficult to know how long it will take to negotiate a contract." The flyer then discusses the possibility of a strike and that it "is likely we would have to hire someone to replace anyone on strike. People who are replaced might lose their jobs." The flyer then mentions that UNITE represents a small number of employees in agencies like IRI.

Another flyer issued by IRI is entitled "Official Union Guarantee." It refers to an alleged UNITE "Guarantee" presumably quoting from UNITE's flyers and making comments and asking questions. Thus UNITE had stated in a flyer that employees will not be charged a fee to join, and that no current employee will ever pay an initiation fee. IRI raised the question about new employees, and asked about assessments fees and dues.

The flyer then quoted UNITE's "guarantee" that employees will have more in their paychecks, and employees will not pay union dues until a contract was ratified, "that gives you a raise far above the cost of the dues." IRI characterized this as "a false promise," and points out that the Union cannot guarantee a raise, and this issue would be determined in negotiations. It adds, "you could be receiving more, less or the same."

Subsequent IRI letters and flyers expressed similar sentiments, such as reinforcing that UNITE has little experience in the field and represents primarily garment workers, employees will have to pay dues and or fees if represented by a union, that bargaining could result in less or the same benefits, that a strike is possible, which could result in replacement or loss of jobs, and that now (without a union) employees have their own voice and can decide who to speak to and when.

On May 28, 2003 IRI held two meetings of its employees, at 9:30 AM and at 1:00 PM. De Natale did most of the speaking on behalf of IRI, but several other officials of IRI such as Heather Barker, Director of Human Resources, and Paul Chilita, Chief Financial Officer also made some comments. The statements made by officials of IRI were similar at both sessions.

De Natale discussed the upcoming election, and emphasized the importance of employees voting and indicated that not voting was the same as voting for the union. [5] De Natale also stated that in his personal opinion he did not think that it would be in the best interest of the employees for the union to come in. De Natale also discussed the bargaining process, as IRI did in its flyers, and reminded their employees that they could wind up with more or less that they had now. He also talked about dues and initiation fees, and told the employees that they would have to pay a $500 initiation fee. Employee Mary Lynch spoke up at the meeting and corrected De Natale on this point, informing him and the employees that she had checked with UNITE, and that current employees would not have to pay a $500 initiation fee. De Natale pointed out to employees that UNITE was a textile workers union, and wouldn't know how to represent IRI's employees. He added that UNITE was losing members, and were recruiting new members to make money.

De Natale warned employees that cost of a union would take up to 10% of IRI's budget, and that IRI "can't afford it." De Natale told the employees to give him some time since he was new at the agency. He expressed his opinion that he wanted the opportunity to work directly with the staff, in the absence of a third party (the union.) In that regard, De Natale told employees if the union was voted in, the relationship between IRI and the employees would change. There would be no more open door policy. If employees had any kind of problem, they cannot go to IRI, but would have to go directly to the Union if they wanted to talk about anything.

Employee Michael Russell asked a question about health coverage. Heather Barker responded that IRI had a program of "Focus Groups" where employees would meet with members of management to discuss health insurance issues, where employees would be informed of IRI's benefits, and would make suggestions to IRI as to what improvements they would like in their coverage. Barker added that if the union won the election, these focus groups would end. [6] Barker also repeated some comments made by De Natale, such as that UNITE's initiation fee was $500 and that UNITE was a factory union; she added that if employees wanted an union, it should be a health care union.

A shift supervisor named Annie made similar remarks, that UNITE is not the right union, this is not the right time, and that it is a garment and textile union.

Joanne Brown, an employee in the Human Resources Department, where employees generally go to with questions about vacation time and sick time, stated that employees "wouldn't have a voice any longer with the union."

Employee Burnett asked if she wanted to find out about her vacation or her time, does that mean that she could not come to Brown and ask these questions? Brown replied, no, that employees would not be able to come to her, but they would be represented by a union, and would have to go through their representative.

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[5] Similar statements were made by IRI in its flyers.

[6] My findings with respect to the subject of focus groups is based on a complication of the testimony of employees Tihesha Young Reddek, Michael L. Russell, Patricia Martis, and former supervisor Paul Campbell. Barker when called as a witness by General Counsel, did not deny making the statements attributed to her by employees concerning focus groups. She merely stated that she did not recall whether the subject of focus groups came up or whether she said anything about focus groups at the meeting. When called as a witness by Respondent, she denied saying that IRI would eliminate focus groups if the Union were elected. I do not credit her denials, and credit the mutually corroborative testimony of the employees as related above.

Paul Chilita also spoke briefly at the meeting, and said that the "Union wasn't necessarily good for the staff."

Another unnamed supervisor responded to a complaint from an employee about the small amounts of her raises. The supervisor replied that if the employee wanted a raise and more money she should go back to school and not vote for the union, and added that "the union is going to mess the company up."

Several employees spoke in favor of and in opposition to the union during the course of the meeting, and were permitted to freely express their views on unionization.

During the course of the campaign several supervisors, and members of management, had individual discussions with employees about the union and or the election.

Supervisor Toschelle Hassell was present while several employees including Patricia Martis were discussing the pro's and con's of getting a union. Hassell chimed in that the employees "don't need no Union," and that the union would make them pay a $500 initiation fee. Hassell added that at a previous job, a union got in and made her pay a $500 fee "for no reason."

IRI's Assistant Executive Director, Ken Brodsky approached employee Trecia Usher at the residence where she works, a few days after the May 28 meeting conducted by De Natale. Brodsky told Usher that she should vote, and added that she should "give Ray a chance."

Brodsky also discussed the union with four employees, Lilly McGee, Sabrina Reeves, Michelle Williamson, and Jimmy Charidge on June 7 at the Park Lane South residence. While they were changing shifts, Brodsky asked the employees if they had received their ballots and if they had voted? None of the employees replied to Brodsky. Brodsky then asked, "what is it that you want? Reeves replied "more money". Brodsky then asked "how much more?" Reeves answered fourteen dollars. Brodsky responded that he didn't know of any agency that paid fourteen dollars. McGee interjected that there were agencies that did. Brodsky concluded the discussion by stating "well, you need to be working for these agencies."

Tamara, a shift supervisor, told employee Marlyn Williams, one of her supervisors, that "UNITE is not the union for us. It's a garment union, and it can't represent us in the field we are in. And it's a textile union."

Employee Michael Russell was spoken to by Sy Herd, IRI's Director of Support Services, Administrator Hannah Nelson and supervisor Madeline. All three of them instructed Russell to make sure and vote and send in his ballot if he didn't want anything to do with the union.

In late April, Harold Burchette, IRI's manager of it's 77th Street House, spoke to employees Martis and Fred Craig at the facility. Burchette asked the employees whether or not anybody from the Union had spoken to them or whether they had spoken to anyone from the Union? Neither Martis nor Craig responded. Burchette stated "okay", and went back to his office. Burchette conducted a monthly house meeting on May 1, with 10 staff members present. After spending most of the meeting discussing work related issues dealing with consumers, Burchette at the end of the meeting, asked, "did anybody from the house speak to anybody from the Union or did anybody from the Union come to your house"? Burchette added that he wanted to know because IRI was going to have a managers meeting at the main office. None of the employees present at the meeting, responded to Burchette's questions.

E. The Effect of Section 211-a on IRI's Campaign

IRI relies primarily on the testimony of two witnesses, in support of its position that Section 211-a affected the ability of IRI to campaign against unionization, and that consequently the election should be set aside.

It's first witness was Steven Beyer, a consultant (and former union official) who testified about his opinion of IRI's campaign, vis-à-vis, what kind of campaign he would have recommended had he been employed as a consultant in the instant campaign. Beyer testified that he received all of the campaign material distributed by IRI, and in his opinion, the material was, "weak, vanilla, certainly doesn't seem to give the voter any direction as to what the employer's position as to union representation," Beyer further testified that in his view, it is "critically important to make sure that voters get varying points of view, particularly the employers position on whether they agree or oppose…Union representation." Beyer also testified that he would characterize IRI's campaign documents as "neutral".

Beyer also testified about some specific examples of where, had he been running the campaign, he would have written campaign material differently. In that regard he prepared his own version of campaign material that he would have recommended, and furnished some specific testimony, as to why he viewed his proposals as more effective. For example, Beyer focused on IRI's response to UNITE's flyer which purported to "guarantee" that employees will not be charged a fee to join the Union, and that employees will have more in their pay checks, not less. As I have noted above, IRI did respond to this flyer, by issuing its own flyer, wherein it refuted the Union's claims, asked about whether new employees would have to pay fees, and asserted that the guarantee of more money in employees pay checks is a "false promise" since bargaining will determine the amount of raises.

Beyer testified however, that he would have attacked the union much harder on their credibility, and made it more clear to voters IRI's view as to UNITE's guarantee. Beyer's version of this flyer, would have added several new questions, including "what is the union hiding in its guarantee?", and questions about ratification. He also recommended adding a line on the bottom reading, "Don't be misled… Vote "NO"!"

Beyer also testified that he would have distributed a copy of an unfair labor practice charge filed against UNITE with the National Labor Relations Board. [7]

In this connection, Beyer testified that he believes that is essential in campaigns to attack the credibility and trust of the Union, and that distributing copies of charges filed against the Union is an effective means of raising that issue, and is clearly anti-union conduct. I note however, as related above that IRI did raise the issue of unfair labor practice charges, by pointing out in a flyer that UNITE had been found guilty of violating the National Labor Relations Act in a case involving *Duane Reade*, by coercing employees into joining the union. The flyer provided an National Labor Relations Board citation of the case, and asked the question "Do you want to be represented by a Union that violates the law?" Beyer conceded that this communication is similar to what he had been testifying about, concerning publicizing National Labor Relations Board charges and attacking the union's credibility, but adds that "I'd probably

[7] The actual charge submitted was a charge filed against UNITE in Massachusetts, alleging that the Union "coerced negotiating committee members,"…with threats of legal action and personal liability if they did not sign the contract," as well as other allegations of union misconduct.

be a lot more hard hitting." Beyer did not testify specifically as to how he would have made this flyer more "hard hitting".

Beyer also conceded that many of the statements issued by IRI in its campaign, were commonly used by Employer's in anti-union campaigns. These statements include, the union is not in the best interest of the company or the employees, employees would or may lose their voice if the union comes in, that after bargaining employees could end up with less than before, bargaining may take a long time, employees will pay high dues or initiation fees, employees may end up on strike and be replaced, that the employer provides good benefits and wages, and requests to give the employer a chance.

De Natale testified that because of Section 211-a, he felt that IRI was required to remain "neutral" during the campaign, and that IRI attempted to do that through its communications to employees and during his speech to employees on May 28. De Natale testified that he was first informed about Section 211-a early in 2003 from conversations with colleagues at various association meetings. He was told that there was a New York State law that required employers using public funds to be neutral and not say anything for or against unions. They characterized the law as a "union gag order." De Natale was also informed that a similar law in California was being questioned as to whether it is preempted by The National Labor Relations Act, and that the law in New York had no regulations, and provided for significant penalties for violations. De Natale did not get a copy of the law or read it at the time.

When IRI received UNITE's petition in April of 2003, De Natale asserts that IRI felt constrained by 211-a in deciding to agree to the Stipulation Election Agreement (SEA), since a decision to contest the unit, could be construed as discouraging union representation. However, De Natale conceded the IRI did insist on exclusion of the category of direct care supervisors as supervisors, and that this exclusion was agreed upon by UNITE.

Once the campaign began, De Natale asserts that IRI ran what he characterized as a "milk toast" campaign, because IRI felt that the law required it to be "neutral". He claimed that but for 211-a, IRI would have been more "aggressive" and "stronger" and urged employees to vote against the Union. In fact when pressed for specifics of what statements, information, pamphlets or flyers it would have issued, but did not use because of Section 211-a, the only item that De Natale mentioned, was a decision not to explicitly tell or ask employees to vote "NO" in the election. He asserted that IRI concluded that as long as it failed to do that, it could remain neutral by providing factual information about the Union, even if negative, and let the employees make up their own mind. Thus De Natale testified that IRI's statement in its flyer that the union was not in the best interests of consumer, and employees is "neutral," since it was not accompanied by a request to vote "NO."

De Natale did not testify as to any specific method of communication that IRI would have used but for Section 211-a, any particular statement or theme (other than Vote "NO"), it would have used had Section 211-a not been in existence, or that IRI would have issued more leaflets, had additional meetings, or spent more money, if it was not constrained by Section 211-a.

De Natale also testified that he and other representatives of IRI discussed among themselves the possibility of hiring a consultant, and concluded that they were sure that because of Section 211-a, IRI couldn't do it. He did not testify that IRI had made a decision that it would have or even that it wanted to hire a consultant during the campaign. Although as noted above, IRI presented Beyer, a consultant as a witness, Beyer was not consulted during the campaign, nor did IRI consider hiring him. Thus the campaign material that Beyer testified that he would have prepared had he been retained, was not considered by IRI in its decisions

as to what kinds of campaign materials to issue.

De Natale testified that IRI decided not to attempt to use the approximately $130,000 of non-public funds [8] that IRI had available to it, to spend on an "anti-union" campaign. According to De Natale, he discussed this subject with IRI's CFO, Chilita, and concluded that it would be difficult to account for particular costs associated with restricted or non restricted funds. Thus, De Natale asserts that it would be hard to keep track of certain percentages of time or activities, and track them to restricted versus unrestricted funds. However, De Natale conceded that IRI is subject to substantial and detailed state regulations concerning its spending, and that is required to detail in its financial reports the amounts of money spent on numerous items, for each site. The items include food, repairs, utilities, transportation, staff travel, equipment, wages, household supplies, telephone, and supplies and materials (non household).

Additionally, IRI is also subject to guidelines from the State that restrict its spending, and specify a long list of items that were not reimbursable costs. These costs include for example political or charitable contributions, costs of professional dues, and personal commuting costs.

II. ANALYSIS AND CONCLUSIONS

A. The Preemption issue

IRI asserts that section 211-a of the New York Labor Law is preempted by the National Labor Relations Act. *Lockyer, supra; San Diego Building Trades v. Garmon,* 359 U.S. 236 (1959), *Local 76 Machinists v. WERC,* 427 U.S. 132 (1976); *Wisconsin Dept. of Industry v. Gould,* 475 U.S. 282 (1986).

The Union argues on the other hand that the statute is not preempted, since the state is not engaging in regulation, but is acting as a "market participant". *Trades Council v. Associated Builders and Contractors of Mass. (Boston Harbor),* 500 U.S. 218, 226–227(1993), *Rust v. Sullivan,* 500 U.S. 173 (1991).

In connection with the disposition of this issue, the parties differ as to their interpretation of what conduct the statute prohibits employers from using state monies to fund. Thus IRI argues, relying on Section 1 of the law, that the statement that "the use of state funds to encourage or discourage employees union organization constitutes a misuse of public funds," means that any conduct, including any statements or literature by an employer discouraging union organization, is subject to the statute's prohibitions. IRI further asserts that Section 2 of the Statute merely provides some specific examples of the kinds of activities prohibited, but are not all inclusive.

The Union disagrees, and contends that the only activities regulated by the Statute are the 3 specific categories of activities described in Section 2. [9] This latter interpretation of the statute is supported by the current New York Attorney General in its response to the Federal Court case attacking this statute as preempted by the National Labor Relations Act. Notably, however this position appears to me to be somewhat inconsistent with the position taken by the

[8] This includes $97,000 of private donations and $33,789 in interest.

[9] They include (a) training managers or supervisors to encourage or discourage union organization; (b) hiring or paying attorneys, consultants to encourage or discourage unionizing, or (c) hiring employees or paying the salaries of employees whose principal duties are to encourage or discourage unionization.

Attorney General's office in 2002 in a memo to the Counsel to the Governor after the bills passage, but prior to the Governor's signing the law. This letter reflect that the new bill expands the provisions of the prior law, and recounted that previous investigations revealed that state funds used to influence union organizing were not covered by the then provision of the law, and that the new bill "expands coverage," to the additional categories specified, and requires maintenance of financial records. Thus this letter suggests that since the prior bill was restricted to prohibiting the spending of public funds to encourage or discourage unionization, that the current bill merely defines same specific examples of conduct prohibited, but are not all inclusive.

However, I do not deem it essential to decide this troublesome issue of statutory interpretation, nor to decide the issue of whether the statute is preempted by the National Labor Relations Act. [10] I shall not decide these issues since for the reasons described below, I conclude that IRI has not established that the law's existence and its alleged effect on IRI's ability to campaign, warrants setting aside the election conducted in this case. Therefore, I shall decide the issue of whether objectionable conduct has been established, by assuming without deciding, that Section 211-a regulates the use of public funds used for any conduct that discourages or encourages union organization, including but not limited to the specific examples in Section 2 of the law. Furthermore, I also will assume, but not decide, that Section 211-a is preempted by the National Labor Relations Act.

B. IRI's Withdrawal from the SEA

One of the issues before me as set forth in the Notice of Objections Report, is the allegation by IRI that the Director interfered with the election by enforcing Section 211-a, by refusing to permit IRI to withdraw from the SEA and refusing to stay the election.

I note initially that although that issue was raised in IRI's objections and was part of the notice of hearing, IRI presented no evidence with respect to this issue and failed to make any reference to it in its extensive and I might add well prepared and cogent brief. Thus it appears that IRI has abandoned that contention. However, since there has been no formal withdrawal of this objection, I shall pass upon it.

I conclude that the Director did not interfere with the election by refusing to permit IRI to withdraw from the SEA, or to stay the election at IRI's request. IRI bases these contentions on the existence of Section 211-a, and its potential affect on employees free choice, issues which IRI has also raised in its objections to the conduct of the election itself.

Whatever the disposition is of that latter contention, there is no basis to conclude that the Director should have permitted the withdrawal from the SEA.

It is well settled that once an election agreement has been approved, a party may withdraw there from only upon an affirmative showing of unusual circumstances. *First FM Joint Ventures LLC, d/b/a Hampton Inn,* 331 NLRB 238 (2000); *National Labor Relations Board v. MMEC Electronic Materials, Inc.,* 363 F.3d 705, 8th Cir. (2004).

[10] I will make the observation however, that in view of the Court of Appeals decision in *Lockyer,* the Board's decision to file an amicus brief therein in support of the preemption position and the position expressed by Assistant General Counsel Lieber to the New York Labor Commissioner with reference to Section 211-a, that it is highly likely that the Board will consider the New York Statute preempted as well.

IRI has not demonstrated any "unusual circumstances," warranting the setting aside of the agreement. While "unusual circumstances" sufficient to justify withdrawal from an SEA has not been defined, it is analogous to a lawsuit seeking to rescind an executory contract. Therefore, it is necessary for IRI to demonstrate the existence of well known standards for rescission of binding contracts, such as fraud in the inducement, lack of capacity or mutual mistake. *MMEC, supra.*

Here IRI as made no such showing. IRI alleges merely that based on De Natale's testimony it felt compelled to enter into the SEA, under the compulsion of section 211-a, because it felt that not entering into the Agreement, could be construed as discouraging union organization under the statute. This contention, even if true would not justify withdrawal, since it is at best a "mutual mistake", not warranting rescission of a binding contract. *MMEC, supra.*

Moreover, I find De Natale's testimony in this respect unpersuasive. IRI was represented by counsel, (albeit different from its current counsel,) during the negotiations for the SEA, had the opportunity to raise unit issues at the time, *Hampton Inn, supra,* and in fact took the position which was agreed to by the Union, to exclude a category of employees as supervisors. Moreover, IRI was admittedly aware of the existence of Section 211-a prior to entering into the SEA.

In my view the only "circumstance" that occurred which motivated IRI's request to withdraw was the IRI's obtaining new counsel, who obviously suggested attempting to withdraw from the SEA and moving to stay the election. Obtaining new counsel is certainly not an "unusual circumstance," justifying withdrawal from IRI's previous agreement.

Therefore, since I conclude that IRI has not established that "unusual circumstances" existed, IRI must be held to its stipulation. *Hampton Inn, supra; MMEC, supra.*

Accordingly I find that neither the Director nor the Board interfered with the election by failing to permit IRI to withdraw from the SEA, or by refusing to stay the election, as requested by IRI. I shall recommend that objections 4 and 5 be dismissed.

C. Impact of Section 211-a on IRI's Campaign and on the Election results

The Board, supported by the Courts has repeatedly held that representation elections are not lightly set aside, and that there is a strong presumption that ballots cast under specific National Labor Relations Board procedural safeguards reflect the true desires of the employees. *Lockheed Martin Corp.,* 331 NLRB 852, 854 (2000); *Nocal Ready Mix,* 327 NLRB 1091, 1092, (1999); *National Labor Relations Board v. Hood Furniture Mfg. Co.,* 941 F.2d 325, 328 (5th Cir. 1991); *National Labor Relations Board v. Monroe Auto Equipment,* 420 F.2d 1329, 1333 (5th Cir. 1973).

Therefore, the burden of proof on parties seeking to overturn a Board supervised election is a heavy one. *Antioch Rock and Ready Mix,* 327 NLRB 1091, 1092 (1999); *Kux Mfg. v. National Labor Relations Board,* 890 F.2d 804, 808 (6th Cir. 1989); *Chicago Metallic Corp.,* 273 NLRB 1677, 1704 (1985). The Party seeking to set aside an election must demonstrate that the conduct complained of interfered with the employees exercise of free choice to such an extent that it materially affected the election. *Bell Foundry v. National Labor Relations Board,* 827 F.2d 1340, 1343 (9th Cir. 1987); *National Labor Relations Board v. Hood, supra.*, or that the conduct was so related to the election as to have had a probable effect upon the employees actions at the polls, *Chicago Metallic, supra; National Labor Relations Board v. Zelrich Company,* 344 F.2d 1011, 1015 (5th Cir. 1965); or that the conduct reasonably tends to interfere

with voters free and uncoerced choice in the election. *Frito Lay Inc.,* 341 NLRB No. 65 Slip. op p.2 (2004): *Allen's Electric,* 341 NLRB # 119 Slip op. p.2 (2004); *Overnite Transportation v. National Labor Relations Board,* 105 F. 3d 1241, 1246 (8th Cir. 1997). The burden of proof is particularly heavy where the margin of victory is overwhelming. *Avis Rent-A-Car System,* 280 NLRB 580, 581, 582 (1992); *Millard Processing Services v. National Labor Relations Board,* 2 F. 3d 258, 264 (8th Cir. 1993). Further, for the purpose of assessing objectionable conduct, the critical period runs from between the filing of the petition and the date of the election. *Gold Shield Security,* 306 NLRB, 20, 22, (1992); *Ideal Electric Mfg. Co.,* 134 NLRB 1265 (1962).

However, where the conduct complained of is committed by a third party, an election will be aside only if the conduct if "so aggravated that it creates a general atmosphere of fear and reprisal rendering a fair election impossible." *Corner Furniture Discount Center,* 339 NLRB #146 Slip op. p. 2(2003); *Cal-West Periodicals, Inc.,* 334 NLRB 599, 600 (2000); *Westwood Horizons Hotel,* 270 NLRB 802, 803, (1984); *Pacific Micronesia Corp. v. National Labor Relations Board,* 219 F.3d 661, 668 (D.C. Cir. 2000); *Overnite Transportation, supra,* at 264-265.

In applying the principles of the above precedent to the facts herein, it must first be determined whether to apply the third party standards to IRI's objections. In that regard, IRI contends that the Union restrained IRI's expression of views by "supporting and enforcing the employer neutrality restriction of New York Labor Law 211-a." However, the record does not support any assertion that UNITE enforced or supported the law during the critical period. IRI points to an undated flyer from the Union, which states, "we expect everyone to vote "YES" and we expect management to remain neutral and to respect our rights and the law during the organizing campaign." Duwe credibly testified that the Union was not referring to Section 211-a in that document, and that the statement about neutrality typically appears in union leaflets, whether or not the employer is subject to Section 211-a. Moreover, after IRI sent a letter stating that IRI is forbidden by law from encouraging or discouraging unionization, and must remain neutral, Duwe informed them that IRI did not have to remain neutral and was allowed to express its opinion and provide information to its employees.

While the record does contain a letter sent out at the instigation of the Union, and signed by various political officials including congress members, supporting UNITE, this letter makes no reference to Local 211-a. Another letter signed by the same politicians was sent out, and did contain a reference to 211-a, but this letter was distributed after the election. Thus there is no credible evidence in the record that the Union attempted to enforce or support the law during the critical period.

Even if one were to conclude that UNITE's campaign letter mentioning "neutrality" was a reference to 211-a (which I do not, in view of Duwe's credited testimony), IRI has not established that the letter was distributed during the critical period. The document is undated, and IRI added no evidence to prove when it was sent or that it was distributed after the petition was filed. Indeed, a careful reading of the document suggests that it was sent out prior to the petition being filed, since it states that the Union had obtained signed cards, and the "next step" (emphasis supplied) is to file with the National Labor Relations Board for election. In any event, since it is IRI's burden to establish that the UNITE's flyer was distributed after the filing of the petition, *Gold Shield, supra,* it has clearly not met its burden in this regard.

Therefore, it is appropriate to apply the third party standard to IRI's objections. It is clear that IRI has adduced absolutely no evidence that any third party conduct has "created a general atmosphere of fear and reprisal," and indeed IRI has not so argued. Thus based on this absence of proof, IRI's objections are without merit.

However, IRI argues that this case must be evaluated under the principles of *General Shoe,* 77 NLRB 724 (1948). There the Board established a standard of ensuring "laboratory conditions" in the conduct of National Labor Relations Board elections, whether or not the conduct complained of constitute on unfair labor practice under the Act. Thus the Board observed:

> In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again. That is the situation here. (Footnotes omitted) *Id.* at 127.

In assessing whether "laboratory conditions" have been met, the Board decides whether the "surrounding conditions enable employees to register a free and untrammeled choice for or against a bargaining representative… or whether the conduct is so glaring that it is almost certain to have impaired employees freedom of choice." *Id.* at 126.

IRI also cites *Continental Oil Co.,* 58 NLRB 169, 172 (1949), cited in *General Shoe,* where the Board set aside an election finding that in the facts therein, "it was virtually impossible to ascertain the full effects upon the employees' free exercise of the right to select a collective bargaining representative."

The Board observed in *Continental Oil,*

> Where we are asked to invalidate elections held under the auspices of the Board our only consideration derives from the Act which calls for freedom of choice by employees of their collective bargaining representatives. Elements, regardless of their source or of their truth or falsity, which, in the experienced judgment of the Board, make impossible an impartial test, are grounds for the invalidation of an election. *Id.* at 172.

Additionally, IRI relies on *P. D. Gwaltney,* 74 NLRB 371 (1940), where the Board based on third party conduct, set aside an election because it found that the election was not held in "an atmosphere conducive to the free and unintimidated choice of representatives which the Act contemplates." *Id*. at 379-380.

While these cases do reflect that the laboratory conditions standards apply in all cases, in fact generally the Board applies these principles to cases involving conduct of a party to the election. See, *Randell Warehouse of Arizona,* 328 NLRB 1034, 1039 (1999); *Pepsi Cola Bottling Co.,* 289 NLRB 736 (1983). (Hearing officer erred by applying third party standard of evaluating whether "an atmosphere of fear and coercion was created" by conduct. Board observed, "where as here the allegedly objectionable conduct is attributable directly to union officials, the proper test is whether the conduct reasonably tends to interfere with the employees free and uncoerced choice in the election.")

The rationale for these decisions, as expressed in *General Shoe, supra,* is that whether

or not conduct involved amounts to an unfair labor practice, the Board has the responsibility to evaluate conditions enabling employees to register a free and untrammeled choice in its election procedures. Thus it will set aside elections if the conduct interferes with that free choice, whether or not the conduct is deemed "coercive." The Board has applied these standards and its rationale in a myriad of situations. *Pearson Education, Inc.,* 316 NLRB 979, 980 (2001). (Electioneering at or near the polls); *Frito Lay, supra,* (Employer's use of ride-alongs to communicate with voters), *Allen Electric, supra.* (Union's conduct of offering to reimburse workers for loss of work time to vote, and Union's carpooling voters to election); *Lockheed Martin, supra,* (Employer's alleged "unfairness" in use of e-mail system); *Archer Services,* 298 NLRB 312 (1990) (Alteration of sample ballot by party to the election), *Sewell Mfg. Co.,* 138 NLRB 66, 70-77 (1962) (Appeals to racial prejudice); *Peerless Plywood Co.,* 107 NLRB 427, 429-430 (1953) (Captive audience speeches within 24 hours of election). See also, *Midland National Life Insurance,* 263 NLRB 127, 130 (1982) (Board abandons *Hollywood Ceramics,* 140 NLRB 221 (1062), and decides that it will not set aside elections based on evaluating of the truth or falsity of campaign propaganda. Board observes that employees are mature individuals capable of recognizing campaign propaganda for what it is, and are aware that parties in a campaign are seeking to achieve certain results and promote their own interests.)

However, these cases unlike the instant matter involve conduct by a party to the election, as does *General Shoe, supra,* even though as noted above, the case does state that the Board can apply the laboratory conditions test to non party conduct as well. Further, a number of Circuit Court opinions have expressly applied the laboratory conditions standards to all cases, whether or not it involves conduct of third parties or whether it involves coercive or non coercive conduct. *Hometown Foods v. National Labor Relations Board,* 416 F.2d 393, 395-400 (5th Cir. 1969); M *& M Supermarkets v. National Labor Relations Board,* 818 F.2d. 1567, 1571-1574 (11th Cir. 1987); *National Labor Relations Board v. Mc Carty Farms,* 24 F.3d 725, 728 (5th Cir. 1994) **[11]**

I would also note however that the Board has at times considered third party conduct vis à vis the issue of confusion of the voters. In such cases, the Board sometimes applies a laboratory conditions analysis, and at other times adds the word confusion to the *Westwood* standard of "creating an atmosphere of fear and coercion rendering a free election impossible." Thus in *Continental Oil, supra,* the War Labor Board (WLB) issued a premature ruling approving a wage increase agreed upon by the Employer and one of the two unions on the ballot. While the WLB subsequently issued a ruling staying the first ruling, some employees had voted prior to the second ruling. The Board concluded that it was virtually impossible to ascertain the full effects of employee free choice of the WLB's announcement just prior to the election, and therefore found that the announcement prevented a free choice by the employees. It further observed that "elements regardless of their source or of their truth or falsity, which, in the experienced judgment of the Board, make impossible an impartial test, are grounds for the invalidation of an election." 58 NLRB at 172 fn. 2.

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[11] *Mc Carty , supra,* however does recognize a difference in standards for evaluating third party versus party conduct. It concludes that although it will apply the laboratory conditions test to third party conduct, it will apply a "more demanding standard" to such activity. Thus where third party conduct is measured, it applies the "destroys the atmosphere standard", instead of the less demanding "tending to influence the outcome of the election," applicable to misconduct of a party to the election. Id. at fn 5.

The Board also considered the issue of confusion of voters in *Chipman Union, Inc.,* 316 NLRB 107 (1950, and *Joint-Gobain Abrasives,* 337 NLRB, 82 (2001). These cases involve statements made by Congressional representatives in support of a union. The Board concluded that such statements were not objectionable, since they did not confuse voters by implying that the Federal Government endorsed the Union. The Board distinguished *Columbia Tanning Corp.,* 238 NLRB 899, 900 (1978), where the Board had considered a letter from the Massachusetts Department of Labor endorsing a union, translated into Greek and sent to employees many of whom do not speak English. The Board concluded that in such circumstances the non English speaking employees could not be expected to discern the difference between the Massachusetts Department of Labor and the National Labor Relations Board, and could reasonably have perceived them as part of one "government" conducting the election. Therefore, it was concluded the "the potential for confusion eliminates the Board's appearance of impartiality and thereby interferes with the exercise of free choice in the election." *Id*. at 900.

In *Allied Metal Hose Co.,* 219 NLRB 1135, 1136 (1975), the Board considered the conduct of rumors spread by employees of statements possibly violative of *Savair.* [12] The Board concluded that the "rumors and misinformation as might have existed did not create an atmosphere of fear, coercion and confusion (emphasis supplied), among Respondent's employees which could reasonably have interfered with employees' free choice." *Id.* at 1136. This addition of confusion to the third party standard of creating an atmosphere of fear and coercion, is consistent with a number of other decisions. *Diamond State Poultry,* 107 NLRB 316 (1953); *Whites Uvalde Mines*, 110 NLRB 278, 279 (1954); *Steak House Meat Co.,* 206 NLRB 28, 29 (1973).

Thus these cases tend to indicate that the issue of confusion of voters can be considered in evaluating third party conduct, although it is not entirely certain whether the laboratory conditions standard of proof will be applied or the more stringent third party test of *Westwood* and its progeny. Further confusing the analysis is *Phoenix Mechanical Inc.,* 303 NLRB 888 (1991), where the Board (in a 2-1 decision), considered misleading statements made by another union, that voting for Petitioner would automatically be a vote for the union. The Board using the *Westwood* third party analysis, found that the conduct was at most a misrepresentation by a third party which did not create "a general atmosphere of a fear and reprisal." Member Raddbaugh dissented, applied a laboratory conditions standard, and concluded that the confusion about who employees were voting for was sufficient to set aside the election.

It is apparent that the caselaw is not entirely clear as to what standard to use in evaluating the conduct complained of here by IRI. Such conduct does not fit precisely into any of the cases described above. However, in my view under any of the standards set forth by the Board or the Courts, IRI has fallen short of meeting its burden of proving the requisite effect on the employees' free choice in the election.

While IRI's objections allege improper third party conduct by New York State, the State DOL, the Attorney General, the Regional Director and the Board itself, by passing and enforcing Section 211-a, and by permitting an election to go forward, notwithstanding the existence of the statute, all of these objections center around the effect of the law on the results of the election

[12] *National Labor Relations Board v. Savair Mfg. Co.,* 414 U.S. 270 (1973). (Dealing with impermissible waivers of initiation fees by unions.)

conducted. In any event, the allegations concerning the Board and the Director have no independent significance, since their only conduct was to allow the election to proceed. This does not rise to the level of Board misconduct, and cannot be construed as grounds for overturning the election.

The conduct of the State and or the Attorney General is another matter, and is the real issue before me. The State has passed a statute, Section 211-a, of the Labor Law, and as I have detailed above, for purposes of evaluating IRI's objections, I shall assume that the statute is preempted, as the 9th Circuit held a similar California law to be.

The question then becomes whether this finding automatically translates to a finding that the election should be set aside. IRI argues that once such a finding is made, there is no need to assess the actual impact of the law on IRI's pre-election activity and to speculate what impact it had on IRI's employees. IRI contends that the interference with the election is obvious, but not quantifiable, and further asserts that "we can say with confidence that the impact would have been favorable to the employer." I disagree.

The impact of conduct upon an election cannot be presumed. *National Labor Relations Board v. Monroe Auto Equipment,* 420 F.2d 1329, 1332 (5th Cir. 1972). Whatever standard one chooses to use IRI must produce evidence that the conduct complained of interfered with the employees free choice. Contrary to IRI's contentions, I do not believe that interference with the election is obvious, but that IRI must demonstrate by evidence that the existence of Section 211-a had a sufficient impact on IRI's campaign and its ability to communicate its views to its employees, so that it materially affected the election. *Bell Foundry, supra,* or it had a probable effect upon the employees actions at the polls, *Chicago Metallic, supra*; or that it created an atmosphere of fear, reprisal or confusion, so as to render a free expression of choice impossible; *Diamond State, supra*; or that the conduct created an atmosphere calculated to prevent a free and untrammeled choice by the employees. *General Shoe, supra.* All of these standards require evidence that the conduct complained of was likely to have affected the results of the election. None of them permit a presumption that the conduct affected the election results, as IRI argues should be applied merely because the statute is found to be preempted.

In objection #6 IRI argues that the actions of the State in passing and enforcing the law, supported the activities of UNITE in the election, by preventing IRI from expressing its views on unionization. Accordingly, IRI argues that by such conduct, the State gave the employees the impression that UNITE was officially sanctioned by the State, and thereby interfered with their informed choice concerning representation. I note however that IRI makes no reference to this theory or argument in its brief, which suggests that such a contention has been abandoned. However, since it is still included in the objections, I shall consider it.

I do not agree that the statute suggests New York State endorsement of UNITE. At best, [13] the law requires that IRI be neutral in its campaign, but does not indicate a preference either for or against unionization, since it prohibits use of public funds both to encourage or discourage unionization. Therefore it cannot reasonably argued that the State is giving the impression that UNITE is officially sanctioned, as IRI contends. *Cf. Columbia Tanning, supra,* (Board finds that Massachusetts DOL letter, sent to employees some of whom were foreign, could reasonably be perceived as confusing employees between National Labor Relations

[13] As I detail more fully below, I do not believe that the law requires total neutrality, since it allows employers to use non public funds to discourage or encourage unionization.

Board and Massachusetts DOL, and eliminates National Labor Relation Board's appearance of impartiality.)

I would add that even if it is found that the statute amounts to an implicit endorsement of the Union by the State, it would not necessarily be objectionable, absent evidence that employees would confuse the endorsement with approval by the National Labor Relations Board. *Saint Gabion Abrasives, supra,* and *Chipman Union, supra,* (Endorsement of Union by members of Congress not objectionable, since employees could discern the difference between statements of member of Congress and statements of the Board and its representatives.)

That brings me to the heart of the IRI's case, which is its contention that the statute prevents employees from receiving election information by prohibiting IRI from expressing its own views concerning unionization, and that it in fact in this election prevented IRI from informing its employees of its opinion and countering the campaigning of UNITE.

It is therefore necessary to examine the evidence adduced by IRI to meet its heavy burden of overturning the election results. In that regard IRI relies principally on the testimony of De Natale, supplemented in part by the testimony of Beyer. I find this evidence to be self serving, conclusionary and speculative, and falls far short of meeting IRI's burden of proof.

The testimony of De Natale and Beyer can be summarized as follows. IRI felt that the statute required it to be neutral, and that therefore it attempted to run a neutral campaign. Further if not for the law, IRI would have run a "more aggressive" campaign, and the campaign that it felt compelled to run by having to comply with the law was "weak" or "vanilla." However, this conclusionary, self serving and speculative testimony is simply not supported by the record.

While both Beyer and De Natale continuously referred to the "weak" and "non aggressive" campaign that IRI was compelled to run, the only specific example of anything that IRI asserts that it would have or should have done was to clearly express IRI's view that employees should vote "NO". No evidence was presented of any specific method of communication that IRI would have used but for 211-a, any particular statement or theme (other then to specifically urge employees to vote "NO") that it would have used had Section 211-a not been in existence, nor that IRI would have issued more leaflets, conducted additional meetings, spent additional monies, or even that it would have hired a consultant, [14] if it did not feel constrained by the law.

More importantly, the record reveals that notwithstanding IRI's purported attempt to remain neutral during the campaign, that it campaigned vigorously, and despite not expressly urging employees to vote "NO", consistently expressed only negative opinions and statements about the Union, so that it is clear and I so find, that any reasonable employee would know that IRI opposed the selection of the Union, and wanted them to vote against the Union in the election.

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[14] I note in this regard that De Natale did testify that he and other representatives of IRI discussed the possibility of hiring a consultant, and concluded that they were sure that because of the law, they were sure they couldn't do it. This testimony is unpersuasive. Thus it is clear that the law does not prohibit the hiring of a consultant, but only requires that it not be paid for by public funds. Further, De Natale did not testify that IRI had decided that it would have hired a consultant, or even that it had inquired as to the cost of hiring a consultant for the campaign.

Indeed from IRI's memo to its supervisors, to its flyers and statements to its employees, IRI's intention was clear. It was attempting to persuade employees that "union representation was not in their best interests." In fact, IRI used that very phrase in its flyer to employees and in De Natale's May 28 speech to all its employees. To argue that there is a significant difference between telling employees that voting for the union is not in their best interests, and telling them to vote "NO" is simplistic and sophomoric. It is simply a matter of semantics, and I conclude that these and other statements by IRI made crystal clear its views on whether employees should vote for the Union, and that employees would reasonably have so concluded.

In this regard, IRI's flyers and comments by its officials including De Natale, was filled with typical anti union statements made in campaigns. They include, in addition to the above comments about unionization not being in employees best interest, that employees may lose their voice if the union comes in, the employees would no longer have focus groups if the union gets in, after bargaining the employees could wind up with less then they have now, bargaining could take a long time, employees will pay high initiation fees and dues, employees could end up on strike be replaced and or lose their jobs, the union wasn't necessarily good for the staff, the union is going to mess the company up, the employees don't need a union, UNITE is a garment union and has little experience representing employees in IRI's industry, that UNITE has been found guilty of unfair labor practices, as well as requesting employees to give IRI a chance.

Therefore, IRI's assertion that Section 211-a prevented its employees from receiving IRI's views on unionization is contradicted by the record.

Nor does the testimony of Beyer provide any support for IRI's position. Beyer testified that in his experience it was sufficient in his anti-union campaign to "put out information in an objective fair fashion, and when employees have that kind of opportunity they will reject the union." In fact IRI ran precisely that type of campaign, as detailed above. While Beyer stressed the necessity of attacking the union's credibility IRI repeatedly did that during the campaign as well.

Beyer created a document, which was introduced into the record, detailing the campaign that he would have recommended had he been retained as a consultant. This document has little probative value in assessing the issues before me, since it is admitted the IRI never considered retaining Beyer, and did not consider using the material Beyer proposed. Thus it cannot be concluded that IRI would have used Beyer's campaign, but for Section 211-a of the Labor Law.

However, even making such an assumption, and examining Beyer's materials, I conclude that this does not support IRI's contentions. In my judgment, apart from the failure to expressly urge employees to vote "NO", which Beyer repeatedly did, there is little significant difference between Beyer's proposed campaign, and the campaign materials issued by IRI. Indeed the two areas concerning which Beyer furnished specific testimony, confirms this conclusion. Beyer testified that his rewrite of IRI's leaflet entitled, "Official Union Guarantee." was a significant change that "hit the union a lot harder." In fact, his rewrite was not significantly different, simply adding some additional questions, and a "vote 'NO'" statement. Most importantly IRI's leaflet had already attacked UNITE's credibility by stating that the Union had made a "false promise."

Beyer also highlighted the importance of bringing to the attention of employees unfair labor practices committed by the Union, to attack the Union's credibility, and presented a sample of a charge filed against UNITE in Massachusetts that he would have distributed. In

fact, IRI went further in its campaign, by pointing in out in a flyer the UNITE had been found guilty of violating the National Labor Relations Act is a case involving Duane Reade, and then implicitly attacked the Union's credibility by asking the question, "do you want to be represented by a Union that violates the law?"

Finally Beyer conceded that may of the statements used by IRI in its campaign, and as detailed above, were commonly used by employer's in anti-union campaigns.

Accordingly, I conclude that IRI has failed to establish its assertion that IRI's employees were deprived by virtue of Section 211-a's constraints on IRI's campaigning, of their rights to hear both sides of the issues with respect to unionization. Contrary to IRI's contentions, IRI's employees were informed of IRI's opposition to unionization, not withstanding the absence of an express request to vote "NO", and it cannot be concluded that the law precluded employees from exercising their free choice in this election.

IRI relies on a number of cases, such as *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966) (Board sets aside election, where employer refuses to supply names and addresses of employees), and *S & H Grossinger's Inc.,* 170 NLRB 330 (1968) (Elections set aside based on refusal of employer to provide access to its premises), which stress the necessity for employees to have an effective opportunity to hear both sides of the argument concerning union representation. However, these decisions are not dispositive, since they are concerned with different issues. Thus these decisions recognize the imbalance of an employer having the employees' names and addresses, and having access to its employees, and represent an attempt by the Board to "level the playing field," in election campaigns. These same considerations are not present here. IRI has full access to its employees, and has the right and as related above, took advantage of that access to employees, in order to campaign against the union.

IRI also relies on the extensive campaign conducted by UNITE, including numerous home visits. This evidence is not relevant. Whatever campaign was conducted by the Union, has no bearing on the campaign conducted by IRI. Due to various issues, more particularly the fact that Employers have direct control over working conditions of employees, the Board often uses different standards in evaluating the conduct of Employers and Unions. See, *Randell Warehouse, supra,* and cases cited therein. For example, IRI emphasizes the fact that the Union's campaign utilized extensive home visits of employees. However, such visits by unions are lawful, absent accompanying coercive conduct, C*anton Corp's Inc.,* 127 NLRB 513 fn. 3 (1960), while Employers are prohibited from engaging in such house visits. *Peoria Plastic Corp.,* 117 NLRB 545, 547 (1957), *Randell Warehouse, supra*, at 1037.

Here, IRI used all of the rights available to it to campaign against the Union, except for failing to expressly urge employees to vote "NO", which I have found to inconsequential. The Board case closest factually to the instant matter is *Lockheed Martin, supra.* There the Board considered an objection by a union that the Employer had engaged in objectionable conduct by giving greater use of its e-mail system to the RD Petitioner. The union argued therein that the Employer's conduct, "precluded employees from fully hearing from both sides," essentially the same argument made by IRI here with respect to the statute. The Board, I would note considered this case under the standard of whether the conduct had a reasonable tendency to interfere with employees free choice, since it involved conduct of a party. Nonetheless, the Board concluded, reversing the Hearing Officer, that since the Union had mounted a vigorous campaign, there was insufficient evidence that there was an imbalance in communications, or that unit employees were precluded from fully hearing the Union's message. 331 NLRB at 855.

Similarly, here as in *Lockheed Martin, supra,* IRI vigorously campaigned, and I find that employees were not precluded from hearing IRI's message, that IRI believed that the Union was not in their best interests which is little different than urging them to vote against the union.

Furthermore, I also conclude that whatever may be said concerning IRI's campaign, it was IRI's choice to "attempt" to run a "neutral" campaign. In fact, the statute does not so require. It only prohibits employer's from using public funds to discourage or encourage unionization.

Therefore, IRI was free to run as aggressive an anti-union campaign as it wished, including repeated specific requests that employees vote "NO". IRI could have easily done so by using non-public monies to pay for such a campaign. IRI had available to it $97,000 in private donations, plus over $33,000 in interest, which could have been used for this purpose. I find De Natale's explanation for IRI's failure to pursue this option to be unconvincing. He testified that he discussed this subject with IRI's CFO, Chilita, and they concluded that it would be difficult to account for particular costs associated with restricted or non-restricted funds. Thus, De Natale asserts that it would be hard to keep track of percentages of time spent by its officials on particular activities and track them to restricted or non-restricted funds. IRI argues that utilizing this option would not be feasible, because "onerous record keeping that is nearly impossible or so prohibitively expensive would be required." I disagree. Such a conclusion is certainly not warranted from De Natale's vague and conclusionary testimony, nor from any other record evidence. Significantly, Chilita, IRI's CFO who according to De Natale discussed the issue with him did not testify. Chilita as the Chief Financial Officer would appear to be IRI's official with the most intimate and direct knowledge of the impact of the alleged "onerous or prohibitively expensive" record keeping that would be required to enable IRI to use non public funds to campaign. However, Chilita was not called as a witness, and I find it appropriate to draw an adverse inference against IRI for its failure to call Chilita to testify on this subject. *International Automated Machines,* 285 NLRB, 1122-1123 (1987).

Moreover, the record reveals that IRI is already subject to extensive record keeping requirements and is required to detail to the State amounts spent on specific items. Therefore, since IRI is used to keeping detailed records, I find no evidence to support IRI's assertion that the additional record keeping required to enable IRI to campaign any way it wished, is particularly onerous or expensive. [15]

Further, numerous individuals, such as lawyers, accountants, architects, consultants, and arbitrators, routinely keep time records, and are paid on the basis of such records. I find nothing particularly onerous about requiring De Natale or any other official of IRI to keep track of their time spent on preparing or reviewing leaflets or giving speeches to employees or any other campaign functions and simply calculate based on their salaries, the amount of money spent on such activities.

While IRI was certainly not required to engage in such a procedure, and was entitled to decide that it would be too unwieldy to do so, that was a choice that IRI made. Having made that choice, IRI must be bound by the results of that choice, and cannot be heard to say that the statute compelled it to try to run a "neutral" campaign. In fact, IRI was free to campaign as

[15] Indeed IRI produced no evidence whatsoever of how the additional record keeping would increase IRI's expenses. Moreover, in order to hire a consultant, it is not necessary for IRI to keep time records. Thus, IRI could easily have used non public funds to pay for a consultant without any worries about allocation of time. It simply decided not to do so.

aggressively as it wished, as long as it did not use non-public funds to do so.

Thus IRI could have chosen that route, or it could have decided not to campaign at all. Instead, it choose a middle ground, and made a "half hearted" [16] attempt to remain neutral, by campaigning vigorously against the Union, but not expressly urging employees to vote "NO". Thus just as in *Lockheed Martin, supra,* where the Board found that the disparity in e-mail use was due at least in part to the union's choice to use other means to communicate, here, the failure of IRI's employees to receive the entirety of IRI's views on unionization, was based on IRI's choice on how to campaign, and was not compelled by the statute.

Finally, I also note that conduct during an election campaign must be evaluated in the light of the closeness of the election's outcome. *Millard Possessing Corp. v. National Labor Relations Board, 2*F.3d 258, 264 (8th Cir. 1993); *Avis Rent a Car,* 280, NLRB 580, 582 (1986). Here as in *Millard, supra,* and *Avis, supra.,* the margin of victory of UNITE (36) votes militates against a finding that the election should be set aside.

Accordingly, based on the foregoing analysis and authorities, I conclude that IRI has failed to establish under any standard of proof, that the free choice of its employees in this election has been affected by Section 211-a of the Labor Law. Therefore I recommend that IRI's objections be dismissed and that the appropriate certification be issued. [17]

Dated

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Steven Fish
Administrative Law Judge

[16] I use the term "half hearted," because in view of my findings above as to the nature of IRI's campaign, I conclude the IRI's campaign cannot reasonably be construed as being "neutral" under any definition of that term.

[17] Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, within 14 days from the date of issuance of this Recommended Decision, either party may file with the Board in Washington, D.C. an original and eight copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof upon the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board may adopt this Recommended Decision.